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Comments

A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses

Lindsay R. Androski[†]

The conflict between mandatory arbitration clauses and class action lawsuits is a timely issue in class action litigation. Both private actors and businesses make wide use of mandatory arbitration clauses in commercial transactions. Insurance companies adopt arbitration provisions as part of provider agreements,¹ employers include arbitration clauses in employment contracts,² credit card issuers incorporate arbitration provisions into cardholder agreements,³ and, by purchasing stocks or other securities, consumers often agree to submit disputes to arbitration.⁴ In most of these situations, the dispute resolution process is straightforward: the parties waive their rights to a judicial forum and instead bring the complaint to a neutral arbitrator.⁵ The parties

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¹ See, for example, *Weiner v Citigroup*, 2002 US Dist LEXIS 6962, *4 (N D Tex 2002) (dismissing plaintiff's claims against insurance company in favor of arbitration).

² See, for example, *Circuit City Stores, Inc v Adams*, 532 US 105, 109–10 (2001) (requiring enforcement of mandatory arbitration clause in employment contract).

³ See, for example, *Roe v Gray*, 165 F Supp 2d 1164, 1167 (D Colo 2001) (upholding an arbitration clause inserted as an amendment to a credit cardholder agreement).

⁴ See, for example, *Smith v American Arbitration Association*, 233 F3d 502, 504 (7th Cir 2000) (involving claim over stock purchase agreement which contained arbitration clause).

⁵ See, for example, American Arbitration Association, Commercial Dispute Resolution Procedures, R-15, R-16 (2003), available online at <<http://www.adr.org/index2.1.jsp>>

trade the judiciary's extensive discovery process and elaborate rules of evidence for the flexibility of selecting their own venue and the confidentiality and informality of an arbitral setting.⁶

The situation becomes more complicated, however, when a group of plaintiffs brings a class action proceeding pursuant to a contract that contains a mandatory arbitration clause. Courts currently disagree over how best to prioritize these competitive interests.⁷ Under federal law, the general rule is clear: when a plaintiff has agreed to a mandatory arbitration clause, he has waived his right to bring a class action suit.⁸ Supreme Court precedent makes an exception where a plaintiff class attempts to bring suit under a statute that expressly provides for a type of relief not normally available in arbitration (such as injunctive, declaratory, or class relief).⁹ In response, the most prominent United States arbitral organization has adopted a rule expanding the scope of an arbitrator's power to encompass full statutory authority.¹⁰ But even in view of these expanded arbitral powers, state courts in Michigan and Florida have voided arbitration provisions for unconscionability where the right to bring a class action suit was expressly authorized by statute.¹¹ These courts have concluded that arbitration and class action suits are inherently incompatible.¹²

In contrast, state courts in California and Pennsylvania have attempted to further the goals of class proceedings while honoring the federal policy favoring arbitration.¹³ These courts have permitted class action suits to proceed under the authority of the arbitral bodies.¹⁴ In California, the courts have implemented a

JSPssid=15747&JSPsrc=upload\LIVESITE\Rules_Procedures\National_International\..\focusArea\commercial\AAA235current.htm#R15> (visited Sept 27, 2003) (discussing appointment of neutral arbitrator).

⁶ See Chief Justice Warren Burger, *Isn't There a Better Way?*, 68 ABA J 274, 277 (1982) (discussing advantages of arbitration).

⁷ Consider Linda S. Mullenix, *Can an Arbitrator Oversee Class-wide Relief? 7th Circuit Rejects Plaintiffs on Class-wide Arbitration*, Natl L J B8 (Aug 26, 2002); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm and Mary L Rev 1 (2000).

⁸ See Part I C.

⁹ See Part I D.

¹⁰ See National Arbitration Forum, Code of Procedure Rule 20(d), which authorizes arbitrators to "grant any remedy or relief allowed by applicable substantive law and based on a Claim, Response, or Request properly submitted by a Party under this Code."

¹¹ See Part I D.

¹² See Part I D.

¹³ See Part II.

¹⁴ See *Keating v Superior Court*, 645 P2d 1192, 1206-10 (Cal 1982) (discussing the virtues of class-wide arbitration and remanding to the trial court); *Dickler v Shearson*

"hybrid" solution, under which the court retains advisory authority over the class action suit, while the arbitrator handles the substantive claims.¹⁵

Several authors have advocated the strategic business uses of arbitration clauses. For example, one has recommended that business lawyers encourage their commercial clients to take advantage of the favorable Supreme Court policy by adopting arbitration clauses whenever practical.¹⁶ Another has explained how franchisers can use arbitration clauses to force franchisees to arbitrate claims individually, thus avoiding suits involving large aggregate damage claims.¹⁷ At the other end of the spectrum, some scholars have taken the position that class actions and arbitration clauses are not incompatible. Specifically, these authors argue that court-ordered class-wide arbitration is a workable solution, and suggest ways that courts, contracting parties, and arbitrators can maximize efficiency in a consolidated arbitration.¹⁸

This Comment, by contrast, argues that class-wide arbitration in any context is improper. Part I discusses the adoption of the Federal Arbitration Act¹⁹ ("FAA") and traces its evolution in case law. It then evaluates the opposing interpretations of Supreme Court precedent by district and state courts confronted with the intersection of a class action claim and a mandatory arbitration clause, first discussing those courts that interpret arbitration clauses to constitute a waiver of class remedies (except where expressly provided by statute), and ending with the hybrid arbitration-litigation approach favored by California and Pennsylvania.

Part II explores the hybrid approach in greater detail, and concludes that the approach is an impractical solution to the con-

Lehman Hutton, 596 A2d 860, 864 (Pa Super 1991) (noting that the contractual agreement was silent with respect to class actions and holding that no Pennsylvania policy precludes class-wide arbitration).

¹⁵ See *Keating*, 645 P2d at 1209.

¹⁶ Kay O. Wilburn, *A Clause You Don't Want to Overlook*, *Bus L Today* 55, 57-58 (Nov-Dec 1996).

¹⁷ Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 *Franchise L J* 141, 142 (1997).

¹⁸ Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 *Iowa L Rev* 473, 524-29 (1987) (proposing modifications to judicial practice, industry arbitration rules, and contract terms). Another extols the virtues of the "hybrid" solution, in which a court retains supervisory authority over a consolidated class-wide arbitration. Daniel R. Waltcher, *Class-wide Arbitration and 10b-5 Claims in the Wake of Shearson/American Express, Inc v McMahon*, 74 *Cornell L Rev* 380 (1989).

¹⁹ 9 USC §§ 1-16 (2000).

flict between class actions and mandatory arbitration for three reasons. First, the hybrid solution is practically unworkable. Second, congressional history supports the exclusion of class proceedings from arbitration. Third, the imposition of class-wide arbitration exceeds judicial authority. Finally, Part III argues that, although case law evolves slowly, judicial modifications to the treatment of arbitration fees provide the best way to address public policy goals while encouraging judicial efficiency.

I. EVOLUTION OF THE CURRENT FEDERAL ARBITRATION POLICY

This section discusses the adoption and implementation of the FAA. Part I A discusses congressional enactment of the FAA. Part I B traces the subsequent explosion of Supreme Court decisions under the FAA, through the adoption of the current liberal federal policy favoring arbitration. Part I C explores the prevalent state court interpretation of case law—that absent explicit statutory protection, a plaintiff who agrees to an arbitration provision waives his right to a class remedy.²⁰ Part I D proceeds to discuss some of the cases in which state courts have voided arbitration provisions as an impermissible waiver of state statutory remedies. Part I E explains the alternative interpretation of case law—namely, the hybrid arbitration-litigation approach favored by California and Pennsylvania.

A. Congressional Enactment of the FAA

Before congressional adoption of the FAA, contractual arbitration clauses were revocable at will.²¹ A party who had previously agreed to arbitration of disputes could opt unilaterally for litigation, severing the (now void) arbitration clause from the remainder of the agreement.²² Congress changed this option in 1924 with the adoption of the FAA. Section 2 of the FAA made agreements for arbitration “valid, irrevocable, and enforceable, save

²⁰ See, for example, *Rains v Foundation Health Systems Life & Health*, 23 P3d 1249, 1253 (Colo App 2001) (“[A]rbitration clauses are not unenforceable simply because they might render a class action unavailable.”); *Sagal v First USA Bank, NA*, 69 F Supp 2d 627, 632 (D Del 1999) (declining to carve out a class action exception to arbitration enforcement under the TILA).

²¹ See Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U Pa L Rev 132, 138–44 (1934).

²² See, for example, *Hamilton v Home Insurance Co*, 137 US 370, 385 (1890) (holding arbitration provision to be distinct and collateral provision, unless made an express condition for the payment of money).

upon such grounds as exist at law or in equity for the revocation of any contract.”²³ Representative Mills of New York, who introduced the original bill in the House, explained that the FAA “provides that where there are commercial contracts and there is disagreement under the contract, the court can enforce an arbitration agreement in the same way as other portions of the contract.”²⁴ Similarly, the chairman of the New York Chamber of Commerce testified before the Senate that the Act would “enable business men to settle their disputes expeditiously and economically, and [would] reduce the congestion in the Federal and State courts.”²⁵ A Senate Judiciary Committee Report supporting the legislation explained that arbitration provides benefits to both consumers and businesses through speedier resolution and lower costs: “The desire to avoid the delay and expense of litigation persists. The desire grows with time and as delays and expense increase. The settlement of disputes by arbitration appeals to big business and little business alike, to corporate interests as well as to individuals.”²⁶

B. Supreme Court Case Law since the Adoption of the FAA

The FAA may have marked the official adoption of a federal policy favoring arbitration, but many years passed before courts fully implemented this policy into case law. As late as 1953, in *Wilko v Swan*,²⁷ the Supreme Court voided an arbitration clause in the securities broker-customer context as an impermissible waiver of a plaintiff’s right to select a judicial forum.²⁸ This judicial hostility toward arbitration remained the prevailing view for another thirty years.

The Supreme Court did not officially acknowledge the “liberal federal policy favoring arbitration agreements” until 1983, in the landmark case of *Moses H. Cone Memorial Hospital v Mercury Construction Corp.*²⁹ *Moses H. Cone* involved a contract dispute between a hospital and a construction company.³⁰ The con-

²³ 9 USC § 2 (2000).

²⁴ 65 Cong Rec H 11080 (June 6, 1924).

²⁵ Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S 4213 and 4214 before a Subcommittee of the Committee on the Judiciary, 67th Cong, 4th Sess 2 (1923) (“Hearing on S 4213 and 4214”).

²⁶ 68th Cong, 1st Sess, S Rep No 68-536, at 3 (1924).

²⁷ 346 US 427 (1953).

²⁸ *Id* at 434–35.

²⁹ 460 US 1, 24 (1983).

³⁰ *Id* at 4–5.

tract provided that disputes submitted to, but not decided by, the architect within a specified time could be submitted to binding arbitration.³¹ After an unsuccessful attempt to resolve the dispute,³² the hospital sought a judicial declaration that Mercury was not entitled to arbitration.³³ The Court ordered the dispute to arbitration and stated that the hospital's second claim—against the architect, who was not a party to the contract—must be resolved in state court because “the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement.”³⁴ More generally, the Court stated that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”³⁵

In 1985, in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc.*,³⁶ the Court reiterated its policy favoring arbitration when it reasoned that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”³⁷ On this logic, the Court expanded the authority of the FAA to permit arbitrability of statutory anti-trust claims,³⁸ and more generally, to issues raised in a counterclaim.³⁹ Since *Mitsubishi*, the Supreme Court has enforced mandatory arbitration clauses in suits arising under a variety of substantive federal statutes, including the Sherman Act,⁴⁰ the Securities Act of 1933,⁴¹ the Securities Exchange Act of 1934,⁴² the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (“RICO”),⁴³ and the Truth in Lending Act (“TILA”).⁴⁴

³¹ Id at 4.

³² Id at 6.

³³ *Moses H. Cone*, 460 US at 7.

³⁴ Id at 20.

³⁵ Id at 24–25.

³⁶ 473 US 614 (1985).

³⁷ Id at 628.

³⁸ Id.

³⁹ Id at 624–25.

⁴⁰ 15 USC §§ 1-7 (2000). See *Mitsubishi*, 473 US at 636–37.

⁴¹ 15 USC § 77a-bbbb (2000). See *Rodriguez de Quijas v Shearson/American Express, Inc.*, 490 US 477, 485–86 (1989).

⁴² 15 USC § 78a-7811 (2000). *Shearson/American Express, Inc v McMahon*, 482 US 220, 222 (1987).

⁴³ 18 USC § 1962(c) (2000). See *Shearson*, 482 US at 242.

⁴⁴ 15 USC §§ 1601-66j (2000). See *Green Tree Financial Corp-Alabama v Randolph*, 531 US 79, 84 (2000).

The Supreme Court officially overruled *Wilko* when it revisited arbitration clauses in the securities setting in *Shearson/American Express, Inc v McMahon*.⁴⁵ In *McMahon*, the Court noted that because arbitration had become the functional equivalent of adjudication, a plaintiff was no longer in danger of waiving any substantive rights by arbitrating a claim.⁴⁶ Under *McMahon*, an arbitration clause is unenforceable only when clear congressional intent indicates that a federal law was meant to override the provisions of the FAA.⁴⁷

In *Gilmer v Interstate/Johnson Lane Corp*,⁴⁸ the Court clarified its position by holding that a party opposing arbitration must prove that Congress intended to preclude a waiver of the judicial forum for the statutory claims at issue.⁴⁹ *Gilmer* alleged that his employer violated the Age Discrimination in Employment Act of 1967⁵⁰ ("ADEA") by discharging him at age sixty-two.⁵¹ At his employer's request, *Gilmer* had registered as a securities representative with the New York Stock Exchange ("NYSE").⁵² Because NYSE Rule 347 provides for arbitration of "any controversy . . . arising out of the employment or termination of employment"⁵³ of a registered representative, *Interstate/Johnson* moved to compel arbitration of *Gilmer's* claim.⁵⁴ The Court affirmed the order to arbitrate, finding that *Gilmer* did not prove that Congress intended to preclude arbitration of ADEA claims.⁵⁵

C. Judicial Interpretation of Mandatory Arbitration Clauses in Class Action Claims

Section 2 of the FAA, which compels judicial enforcement of arbitration agreements "in any . . . contract evidencing a transaction involving commerce," contains no provisions specific to class

⁴⁵ 482 US 220 (1987).

⁴⁶ See *id.* at 229 ("[W]here arbitration does provide an adequate means of enforcing the provisions of the Exchange Act, § 29(a) [prohibiting waiver of substantive obligations imposed by Exchange Act] does not void a predispute waiver of § 27 [granting exclusive jurisdiction of Exchange Act violations to the district courts].").

⁴⁷ *Id.* at 226-27.

⁴⁸ 500 US 20 (1991).

⁴⁹ *Id.* at 26.

⁵⁰ 29 USC §§ 621-34 (2000).

⁵¹ *Gilmer*, 500 US at 23-24.

⁵² *Id.* at 23.

⁵³ NYSE Rule 347.

⁵⁴ *Gilmer*, 500 US at 23-24.

⁵⁵ *Id.* at 35.

action claims.⁵⁶ In *Allied-Bruce Terminix Cos, Inc v Dobson*,⁵⁷ the Supreme Court interpreted Section 2 to implement Congress's intent "to exercise [its] commerce power to the full."⁵⁸ As the Court explained in *Mitsubishi*, arbitration is mandated in all situations where the arbitral forum offers protection of the substantive rights created by a particular statute.⁵⁹ Thus, courts ruling on motions to compel arbitration in class action proceedings must determine whether the inability to proceed as a class would constitute an impermissible waiver of a substantive statutory right.⁶⁰

In some cases, interpreting the effect of arbitration clauses on class actions is simple because the contracting parties have included a clause explicitly barring class-wide arbitration. For example, the arbitration clause at issue in *Lozada v Dale Baker Oldsmobile, Inc*⁶¹ contained the following language: "The arbitration shall not be consolidated with any other arbitration."⁶² Organizations such as the SEC,⁶³ Nasdaq,⁶⁴ and the NYSE⁶⁵ have adopted blanket rules excluding class actions from arbitration.⁶⁶

A plaintiff's right to litigate class action claims is waivable,⁶⁷ even when that procedural right is expressly provided by statute, as it is in the TILA.⁶⁸ A Delaware Superior Court found that, under Delaware law, an arbitration clause that precluded class-wide arbitration of disputes was not unconscionable because "[t]he surrender of that class action right was clearly articulated in the

⁵⁶ 19 USC § 2.

⁵⁷ 513 US 265 (1995).

⁵⁸ *Id* at 277.

⁵⁹ *Mitsubishi*, 473 US at 628.

⁶⁰ FRCP 23, by contrast, is a *procedural* right. See Part II C.

⁶¹ 91 F Supp 2d 1087 (W D Mich 2000).

⁶² *Id* at 1099.

⁶³ See Order Approving Proposed Rule Change Relating to the Exclusion of Class Actions from Arbitration Proceedings, 57 Fed Reg 52659, 52660 (Nov 4, 1992).

⁶⁴ See NASD Rule 10301.

⁶⁵ NYSE Rule 600(d), available online at <<http://www.nyse.com/pdfs/Rules.pdf>> (visited Sept 27, 2003) ("A claim submitted as a class action shall not be eligible for arbitration.")

⁶⁶ See, for example, *Nielsen v Piper, Jaffray & Hopwood, Inc*, 66 F3d 145, 148-49 (7th Cir 1995) (finding arbitration of class action prohibited by NASD Rules); *Olde Discount Corp v Hubbard*, 4 F Supp 2d 1268, 1271 (D Kan 1998) (same).

⁶⁷ See *Rains*, 23 P3d at 1253 ("[A]rbitration clauses are not unenforceable simply because they might render a class action unavailable."). See also *Pyburn v Bill Heard Chevrolet*, 63 SW3d 351, 364 (Tenn App 2001).

⁶⁸ See, for example, *Sagal v First USA Bank, NA*, 69 F Supp 2d 627, 632 (D Del 1999) (declining to carve out an exception to arbitration enforcement under the TILA).

arbitration amendment.”⁶⁹ Similarly, a Florida court upheld a forum selection clause when the effect of enforcement was to preclude class relief.⁷⁰

However, the vast majority of contracts merely incorporate boilerplate arbitration clauses patterned after the American Arbitration Association (“AAA”) prototype. The arbitration clause at issue in *Powertel, Inc v Bexley*⁷¹ serves as a standard example. The clause read:

Any unresolved dispute, controversy or claim arising out of or relating to [Powertel’s] service, including but not limited to a claim based on or arising from an alleged tort, shall be settled by arbitration administered by the American Arbitration Association under its [industry-specific rules], and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.⁷²

When faced with a contract which—like the *Powertel* example—is silent with respect to class proceedings, courts will generally assume that assent to arbitration indicates waiver of the right to bring a class action.⁷³ For example, in *Johnson v West Suburban Bank*,⁷⁴ the Third Circuit ordered plaintiff’s TILA⁷⁵ and Electronic Fund Transfer Act⁷⁶ (“EFTA”) class action claims to proceed individually in arbitration.⁷⁷ The court noted that neither the TILA nor the EFTA explicitly precludes the selection of arbitration instead of litigation, and that neither statute specifically confers the rights to proceed as a class.⁷⁸ As such, the court noted that “it

⁶⁹ *Edelist v MBNA America Bank*, 790 A2d 1249, 1261 (Del Super 2001).

⁷⁰ *America Online, Inc v Booker*, 781 So2d 423, 425 (Fla App 2001).

⁷¹ 743 So2d 570 (Fla App 1999).

⁷² *Id.* at 572. The parties agreed that the use of consumer services constituted a transaction in interstate commerce, and was thus subject to the FAA. *Id.*

⁷³ See, for example, *Dominum Austin Partners, LLC v Emerson*, 248 F3d 720, 728–29 (8th Cir 2001) (finding that where arbitration clause made “no provision for arbitration as a class,” the district court properly compelled named plaintiffs to arbitrate their claims as individuals); *Champ v Siegel Trading Co, Inc*, 55 F3d 269, 275–77 (7th Cir 1995) (finding class-wide arbitration prohibited where the “arbitration agreement [made] no mention of class arbitration” and “[did] not expressly provide for class arbitration”); *Gammara v Thorp Consumer Discount Co*, 15 F3d 93, 96 (8th Cir 1994) (requiring plaintiff to arbitrate own claims before court would entertain class allegations).

⁷⁴ 225 F3d 366 (3d Cir 2000).

⁷⁵ 15 USC § 1601-66j.

⁷⁶ 15 USC § 1693 (2000).

⁷⁷ *Johnson*, 225 F3d at 377 n 4.

⁷⁸ *Id.* at 369.

appears impossible" for parties to pursue a class action in arbitration "unless the arbitration agreement contemplates such a procedure."⁷⁹ The court dismissed allegations that arbitration would discourage a plaintiff from asserting his rights under the TILA, positing instead that the TILA's statutory cap on litigious class recoveries may make arbitration a more financially attractive option.⁸⁰ Moreover, the court pointed to the provision providing for recovery of attorneys' fees to support its contention that a steady supply of lawyers would remain willing to pursue TILA claims.⁸¹

D. Voiding Arbitration Clauses

Section 2 of the FAA guides judicial inquiry into the enforceability of arbitration agreements by providing that such agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."⁸² Courts apply state law to determine whether generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements.⁸³ Accordingly, some courts have relied upon state contract law principles to void an arbitration clause that would preclude a class remedy when such remedy is expressly authorized by state statute.⁸⁴

1. *Federal law preemption of state contract law.*

*Southland Corp v Keating*⁸⁵ involved multiple suits filed by franchisees against their franchisor, alleging violations of California law.⁸⁶ The California Supreme Court voided the arbitration provision in the franchise agreements, concluding that the California Franchise Investment Law⁸⁷ mandated judicial considera-

⁷⁹ Id at 377 n 4.

⁸⁰ Id at 374-75.

⁸¹ *Johnson*, 225 F3d at 374-75.

⁸² 9 USC § 2.

⁸³ *Doctor's Associates, Inc v Casarotto*, 517 US 681, 687 (1996).

⁸⁴ See, for example, *Powertel*, 743 So2d 570, 577 (Fla App 1999) (voiding arbitration clause for procedural and substantive unconscionability under Florida law); *Lozada v Dale Baker Oldsmobile, Inc*, 91 F Supp 2d 1087, 1102-05 (W D Mich 2000) (reaching similar conclusion under Michigan law); *Ramirez v Circuit City Stores Inc*, 90 Cal Rptr 2d 916, 920-21 (Cal App 1999) (finding arbitration clause unconscionable under California law because it is unilateral and bars punitive damages).

⁸⁵ 465 US 1 (1984).

⁸⁶ Id at 4.

⁸⁷ Cal Corp Code Ann § 31000 et seq (West 1977). The law invalidated certain arbitration agreements that were permissible under the FAA.

tion of claims brought pursuant to it and "did not contravene" the FAA.⁸⁸ The Supreme Court reversed, holding that the FAA is binding upon the states and preempts any state laws invalidating FAA provisions.⁸⁹ Because the FAA mandated enforcement of contractual arbitration provisions, a blanket provision like California's, requiring judicial involvement, would affect only those contracts that normally would be subject to arbitration; as such, the provision directly contradicted the goals of the FAA and was void.⁹⁰ Likewise, in *Doctor's Associates, Inc v Casarotto*,⁹¹ the Supreme Court voided a state statute requiring contracts with arbitration clauses to contain a notice typed on the first page in capital letters and underlined.⁹² The Court held that Section 2 of the FAA preempts state law provisions that apply only to contracts that are subject to arbitration, and permits only provisions that apply equally to "any contract."⁹³

2. Unconscionability and the availability of equivalent relief.

The Supreme Court has held that "so long as the prospective litigant effectively may vindicate [his] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."⁹⁴ Thus, the federal policy favoring arbitration rests on the assumption that the arbitral and judicial forums provide equivalent relief. On this basis, the Eleventh Circuit has held that an arbitration clause is not enforceable if it would defeat the remedial purpose of the statute upon which an action is based.⁹⁵

Both federal and state courts have used this reasoning to void contractual arbitration provisions for unconscionability under state law.⁹⁶ *Powertel* involved a 23(b)(3) consumer class action

⁸⁸ *Keating*, 465 US at 5.

⁸⁹ *Id* at 16-17.

⁹⁰ *Id* at 16.

⁹¹ 517 US 681 (1996).

⁹² *Id* at 683.

⁹³ *Id* at 686.

⁹⁴ *Mitsubishi*, 473 US at 637.

⁹⁵ *Randolph v Green Tree Financial Corp-Alabama*, 178 F3d 1149, 1157-58 (11th Cir 1999); *Paladino v Avnet Computer Technologies, Inc*, 134 F3d 1054, 1059 (11th Cir 1998).

⁹⁶ See, for example, Steven J. Ware, *Arbitration and Unconscionability after Doctor's Associates, Inc v Casarotto*, 31 Wake Forest L Rev 1001 (1996) (reviewing federal court holdings regarding unconscionability); *Szetela v Discover Bank*, 118 Cal Rptr 2d 862, 864 (Cal App 2002) (striking portion of arbitration clause barring class or representative actions as unconscionable).

alleging wrongful long distance charges.⁹⁷ The Florida Court of Appeals denied Powertel's motion to compel arbitration and voided the arbitration provision as both procedurally and substantively unconscionable under Florida law.⁹⁸ The court found procedural unconscionability because the arbitration clause was adopted in an adhesion contract⁹⁹ and because the consumers had no choice but to agree to the new arbitration clause if they wished to continue service.¹⁰⁰ The court based its finding of substantive unconscionability on the fact that the waiver limited Powertel's liability to actual damages by precluding the possibility that it would ever be exposed to a class remedy, which was expressly provided for by a state consumer protection statute.¹⁰¹ Hypothetically, the *Powertel* court could have satisfied the literal statutory requirements by ordering the class action to proceed in arbitration. By declining to do so, the court concluded that an arbitration clause and class action claim are incompatible.

The Western District of Michigan issued a similar holding in *Lozada*, a suit brought by class member automobile purchasers against an automobile dealership. The *Lozada* court based its analysis on the test for validity of an arbitration agreement laid out in an earlier Michigan state case:

[T]o be enforceable and reasonable, an arbitration agreement must meet three elements: (1) the parties must have agreed to arbitrate the claims (there must be a valid, binding contract governing the statutory claims in issue); (2) the statute involved must not prohibit such agreements; and (3) the arbitration agreement must not waive the substantive rights and remedies of the statute and the arbitration procedures must be fair so that the [plaintiff] may effectively vindicate his statutory rights.¹⁰²

⁹⁷ 743 So2d at 572.

⁹⁸ *Id.* at 574. Alternatively, the request was denied because Powertel attempted to add the arbitration requirement after the lawsuit had been filed. *Id.* at 577.

⁹⁹ An adhesion contract is a "standard-form contract prepared by one party, to be signed by the party in a weaker position, usu. a consumer, who has little choice about the terms." Black's Law Dictionary 318-19 (West 7th ed 1999).

¹⁰⁰ *Powertel*, 743 So2d at 575. The court rejected Powertel's argument that the consumers could cancel their phone service and sign agreements with new providers, because the consumers' equipment could only be used with the Powertel service and because their telephone numbers could not be transferred to a new provider. *Id.*

¹⁰¹ *Id.* at 576.

¹⁰² *Lozada*, 91 F Supp 2d at 1102-03, citing *Rembert v Ryan's Family Steak Houses, Inc.*, 596 NW2d 208, 226 (Mich App 1999).

The court held that to be “fair” under this definition, the agreement must contain the following minimal procedural protections: (1) clear notice, (2) right to counsel, (3) reasonable discovery, (4) a fair hearing, and (5) a neutral arbitrator.¹⁰³

The *Lozada* court held that, because the TILA and the corresponding Michigan statute both expressly provide for the availability of injunctive and declaratory relief,¹⁰⁴ an arbitration clause that did not specifically permit such relief was unreasonable.¹⁰⁵ Consequently, the court voided the arbitration clauses in the plaintiffs’ contracts and allowed the class action to proceed.¹⁰⁶

The Florida and Michigan decisions follow naturally from Supreme Court precedent. A court compelling arbitration under a state statute that provides for a particular type of relief—and which applies to *all* contracts—may only compel arbitration if that relief is available in the arbitral setting. Because class suits cannot practically or legally proceed in arbitration, the Florida and Michigan courts properly refused to compel arbitration of the class claims. State legislatures concerned with protecting consumers may thus avoid the default rule of class action waiver and individual arbitration by expressly incorporating class remedies into statutes.

3. Arbitration costs.

Does the absence of a provision limiting arbitration costs effectively prevent the use of the arbitral forum to vindicate rights? Cost has become especially relevant in light of *Green Tree Financial Corp.-Alabama v Randolph*,¹⁰⁷ in which the Supreme Court held that, while it is possible for arbitration fees to be so burdensome as to prevent plaintiffs from vindicating their rights, the plaintiff bears the burden of proving that arbitration is “prohibitively expensive.”¹⁰⁸ Lower court interpretation of the *Green Tree* ruling varies widely.

The District of Columbia Circuit ruled in the context of federal employment claims that, to be enforceable, an arbitration agreement may not require employees either to pay unreasonable

¹⁰³ Id at 1103.

¹⁰⁴ Mich Comp Laws § 445.911(3).

¹⁰⁵ *Lozada*, 91 F Supp 2d at 1105.

¹⁰⁶ Id at 1105 (finding arbitration clause to be procedurally and substantively unconscionable).

¹⁰⁷ 531 US 79 (2000).

¹⁰⁸ Id at 92.

costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.¹⁰⁹ The Southern District of Florida ruled similarly when it held that a contractual provision splitting attorneys' fees, coupled with a failure to limit the arbitration expense allotted to the consumer, made an arbitration clause unenforceable under the TILA.¹¹⁰

The Eleventh Circuit reversed the decision by the Southern District of Florida, presumably rejecting plaintiffs' argument that the prohibitive cost of arbitration was itself a sufficient reason to void the arbitration clause.¹¹¹ This ruling echoed the sentiment of many other courts. The Northern District of Illinois held that a consumer may not avoid an arbitration agreement by complaining of costs,¹¹² and the Middle District of Alabama declined to deem an arbitration provision that failed to limit arbitration costs unconscionable under Alabama law.¹¹³ Likewise, a Colorado Court of Appeals rejected a plaintiff's contention that arbitration should not be ordered because it was too expensive.¹¹⁴

E. Court-Ordered Class-wide Arbitration

Two state courts have ordered class action claims to proceed in arbitration. In *Keating v Superior Court*,¹¹⁵ the California Supreme Court concluded that forcing independent arbitration of claims would seriously prejudice the interests of numerous franchisees seeking relief against their franchisor.¹¹⁶ The court argued that public policy favored class-wide arbitration, stating that the interest of justice required the court to "give expression to the basic arbitration commitment of the parties."¹¹⁷ In justifying its decision, the court relied on state law that expressly permitted courts to consolidate arbitrations.¹¹⁸

¹⁰⁹ *Cole v Burns International Security Services*, 105 F3d 1465, 1482 (DC Cir 1997).

¹¹⁰ *Baron v Best Buy Co, Inc.*, 75 F Supp 2d 1368, 1370-71 (S D Fla 1999).

¹¹¹ See *Baron v Best Buy Co, Inc.*, 260 F3d 625 (11th Cir 2001) (unpublished opinion).

¹¹² *Dorsey v HCP Sales, Inc.*, 46 F Supp 2d 804, 808 (N D Ill 1999).

¹¹³ *Rhode v E & T Investments, Inc.*, 6 F Supp 2d 1322, 1328 (M D Ala 1998).

¹¹⁴ *Rains*, 23 P3d at 1253.

¹¹⁵ 645 P2d 1192 (Cal 1982). For a more thorough overview of *Keating*, see Elizabeth P. Allor, Note, *Keating v Superior Court: Oppressive Arbitration Clauses in Adhesion Contracts*, 71 Cal L Rev 1239 (1983).

¹¹⁶ *Keating*, 645 P2d at 1207.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1208 & n 19. Cal Civ Proc Code § 1281.3 permits consolidation of separate arbitration proceedings when:

In *Dickler v Shearson Lehman Hutton, Inc.*,¹¹⁹ a Pennsylvania Superior Court explained that the strong federal and state policies favoring arbitration required it to interpret the words “any controversy” in the parties’ arbitration agreement to include class actions.¹²⁰ This freedom of contract argument—perhaps the strongest argument in favor of class-wide arbitration—is discussed in more detail in Part II B.

Unlike consolidations, where all parties are present to represent their own interests, class actions involve a representative party acting on behalf of absent class members.¹²¹ The courts invoking class-wide arbitration have recognized that class-wide arbitration is “a different animal” than individual arbitration, and have acknowledged the need for substantial trial court involvement.¹²² Scholars have echoed these concerns, and offer several justifications for judicial intervention. First, class certification,¹²³ notice requirements,¹²⁴ and designation of an appropriate class representative¹²⁵ involve complicated legal questions on which arbitrators may be more likely than judges to commit error.¹²⁶

(1) Separate arbitration agreements or proceedings exist between the same parties; or one party is a party to a separate arbitration agreement or proceeding with a third party; and (2) The disputes arise from the same transactions or series of related transactions; and (3) There is common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators.

Although the FAA does not specifically mention consolidation of arbitrations, some federal courts of appeals, at the time of the *Keating* decision, permitted consolidation where cases involved a common nucleus of law and fact. The Third Circuit, for example, reasoned that because a contract required arbitration of “all claims, disputes, and other matters,” the parties had implicitly agreed to consolidation of claims in arbitration. *Gavlik Construction Co v HF Campbell Co*, 526 F2d 777, 788 (3d Cir 1975). See *Compania Espanola de Petroleos, SA v Nereus Shipping, SA*, 527 F2d 966, 975 (2d Cir 1975) (holding that the liberal interpretation of the FAA encourages consolidation of arbitration proceedings). However, not all circuits followed this lead. The Ninth Circuit, in *Weyerhaeuser Co v Western Seas Shipping Co*, declined to consolidate arbitration claims where the parties did not explicitly contemplate such a situation. 743 F2d 635, 637 (9th Cir 1984).

¹¹⁹ 596 A2d 860 (Pa Super 1991).

¹²⁰ *Id* at 867.

¹²¹ Waltcher, 74 Cornell L Rev at 399 & n 120 (cited in note 18).

¹²² *Dickler*, 596 A2d at 866. See also Waltcher, 74 Cornell L Rev at 404–05 (cited in note 18).

¹²³ FRCP 23(c)(1).

¹²⁴ FRCP 23(c)(2).

¹²⁵ FRCP 23(a).

¹²⁶ See Waltcher, 74 Cornell L Rev at 405 n 156 (cited in note 18), citing T. Oehmke, *Commercial Arbitration* § 9:4, 162–63 (Lawyers Co-op 1987) (“There are no strict qualifications to serve as an arbitrator—it is not necessary to be an attorney, although legal training is evidently helpful. The most important quality is expertise in the subject of the dispute.”).

Second, even the Supreme Court has expressed concern over the fact that arbitrators may decide cases without providing thorough legal explanations or complete records of the proceedings.¹²⁷ Third, Section 10 of the FAA,¹²⁸ which provides an extremely high hurdle for vacating an arbitrator's decision,¹²⁹ effectively eliminates from arbitration the appeals process enjoyed in the court system.¹³⁰ This greatly reduces the likelihood that an erroneous arbitration decision will be corrected, and thus amplifies the potential for societal harm.

An advocate of class-wide arbitration might dismiss these concerns by pointing out that class settlements (which account for the vast majority of class action certifications)¹³¹ also conclude without complete records or thorough legal explanations. At first glance, this would seem to imply that courts are willing to forgo the benefits of clear records or explanations when parties have arrived at a mutually agreeable solution. However, such an assertion ignores the fact that Rule 23(c)(1) of the Federal Rules of Civil Procedure requires court approval for class settlements.¹³² Congress has deemed it necessary for a court to ensure that the parties' interests are served in a fair and proper manner, even in the absence of litigation. Moreover, when a proceeding is truly adversarial (as it is during the class certification period), procedural safeguards specific to class actions are of the utmost importance.

Owing to the distinct attributes of class litigation, both the *Keating* and *Dickler* courts recognized that class-wide arbitration would necessarily entail a greater degree of judicial involvement than is normally associated with individual arbitration.¹³³ The *Keating* court would need to guide certification and notice procedures "to safeguard the rights of absent class members to ade-

¹²⁷ See *Gilmer*, 500 US at 31 (recognizing that arbitrators often will not issue written opinions, thus reducing effectiveness of appellate review, but stating that the NYSE rules avoid this problem by requiring arbitration awards to be detailed in writing); *McMahon*, 482 US at 257 (Blackmun dissenting) (citing the lack of judicial review and difficulty in vacating an award as concerns).

¹²⁸ 9 USC § 10 (2000).

¹²⁹ An arbitration award may be vacated only for (1) fraud or corruption in procuring the award; (2) arbitrator partiality; (3) arbitrator misconduct resulting in prejudice to a party; or (4) failure of the arbitrators to reach a "mutual, final, and definite award." *Id.* Note that errors of law—even constitutional violations—are not subject to correction.

¹³⁰ See, for example, FRAP 3(a) (providing rule for filing a notice of appeal).

¹³¹ Robert H. Klonoff and Edward H.K. Bilich, *Class Actions and Other Multi-Party Litigation* 362 (West 2000).

¹³² FRCP 23(c)(1).

¹³³ *Keating*, 645 P2d at 1209; *Dickler*, 596 A2d at 866.

quate representation.”¹³⁴ California has ordered this type of “hybrid” arbitration-litigation many times since *Keating*.¹³⁵

II. THE HYBRID SOLUTION IS IMPRACTICAL AND IMPROPER

One commentator has echoed the California and Pennsylvania courts in suggesting that, because there are strong federal policies favoring both class actions and arbitration, the judiciary should “permit the combination of the two devices” rather than choose between them.¹³⁶ The suggestion may be appealing initially, if for no reason but its appearance of compromise. Part II of this Comment reviews the purposes behind class actions and arbitration in an effort to highlight the inherent incompatibility of the two devices. Because arbitrators are ill-equipped to conduct class action arbitrations, class-wide arbitration is untenable in practice. Congressional history supports the exclusion of class proceedings from arbitration. Moreover, because judicial oversight of class-wide arbitration exceeds the limits of congressional judicial authority, the only statutorily permissible solution is to interpret arbitration clauses to waive class actions.

A. Incompatibilities Between the Policies Favoring Class Actions and Those Favoring Arbitration

In analyzing the purported benefit of a judicially monitored class-wide arbitration, it is useful to revisit the independent benefits of an arbitration system and class remedies. Class action suits serve mainly as efficiency-promoting devices, both reducing the judicial caseload and providing societal benefit by simultaneously resolving multiple individual claims.¹³⁷ The assurance of

¹³⁴ 645 P2d at 1209. The *Dickler* court was less concerned with due process issues, relying in part on *Stevenson v Commonwealth Department of Revenue*, 413 A2d 667 (Pa 1980), in which the Pennsylvania Supreme Court held a class action claim before the state Board of Arbitration of Claims to be proper. *Id.* at 668. The *Stevenson* court concluded that the risk of procedural error in class-wide arbitration was minimized because the Board had adopted the entire Pennsylvania Rules of Civil Procedure, including class action rules, to govern its proceedings. *Id.*

¹³⁵ See, for example, *Blue Cross of California v Superior Court*, 78 Cal Rptr 2d 779, 790 (Cal App 1998) (holding that class-wide arbitrations were not preempted by FAA); *Izzi v Mesquite Country Club*, 231 Cal Rptr 315, 321 (Cal App 1986) (holding that the court was bound by *Keating* precedent); *Lewis v Prudential Bache Securities Inc.*, 225 Cal Rptr 69, 75 (Cal App 1986) (“This case appears to offer no great difficulty in adapting arbitration to fit the class action mold, with adequate judicial supervision over the class aspects.”).

¹³⁶ Waltcher, 74 Cornell L Rev at 395–98 (cited in note 18).

¹³⁷ See *Eisen v Carlisle & Jacquelin*, 391 F2d 555, 560 (2d Cir 1968), vacd 417 US 156 (1974) (“By establishing a technique whereby the claims of many individuals can be re-

consistent outcomes ensures fairness and certainty.¹³⁸ Perhaps most importantly, class actions permit plaintiffs to pursue claims that, individually, may not warrant the outlay of litigation costs.¹³⁹

Arbitration, too, provides efficiency gains. Then-Chief Justice Warren Burger, in a 1982 article, listed some of the important advantages of private arbitration in large, commercial disputes:

- Parties can select the arbitrator, taking into account the special experience and knowledge of the arbitrator.
- A privately selected arbitrator can conduct all proceedings in a setting with less stress on the parties; confidentiality can be preserved where there is a valid need to protect trade secrets, for example.
- Arbitration can cope with complex business contracts, economic and accounting evidence, and financial statements. A skilled arbitrator, acting as the trier, can digest evidence at his own time and pace without the expensive panoply of the judicial process. . . .
- Parties to arbitration can readily stipulate to discovery processes in a way that can control, if not eliminate, abuses of those processes.¹⁴⁰

Congressional debate surrounding passage of the FAA indicates that its adoption was meant to address “agitation against the costliness and delays of litigation.”¹⁴¹ Arbitrators avoid delays in the traditional process through informal rules of evidence,¹⁴²

solved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.”); *Esplin v Hirschi*, 402 F2d 94, 101 (10th Cir 1968), quoting *Dolgow v Anderson*, 43 FRD 472, 488 (E D NY 1968) (“[I]t is virtually certain that a class action will ‘achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated.’”).

¹³⁸ See *Eisen*, 391 F2d at 560.

¹³⁹ *Id.* at 560, 566 n 16.

¹⁴⁰ Burger, 68 ABA J 274 (cited in note 6). See also William Rehnquist, *A Jurist’s View of Arbitration*, 32 Arb J 1, 7 (1977).

¹⁴¹ HR Rep No 68-96, at 2 (1924).

¹⁴² American Arbitration Association, Commercial Dispute Resolution Procedures, R-31(a) (2003), available online at <http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules_Procedures\National_International\...\focusArea\commercial\AAA235current.htm#R31> (visited Sept 27, 2003) (“Conformity to legal rules of evidence shall not be necessary.”).

flexibility in scheduling¹⁴³ and conducting proceedings,¹⁴⁴ and limited review of awards.¹⁴⁵

The FAA contains an “unmistakably clear” statement of congressional purpose that “the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.”¹⁴⁶ A hybrid solution is thus improper because it subjects arbitration to the very judicial burden that the contracting parties sought to avoid through arbitration.¹⁴⁷

FAA provisions clearly outline the extent to which the judiciary may be involved in arbitration proceedings. Congress has granted courts the power to enforce arbitration clauses,¹⁴⁸ appoint arbitrators where necessary,¹⁴⁹ and perform limited review of awards.¹⁵⁰ Congress has not, however, granted explicit judicial authority to oversee class action arbitration. A defendant of the hybrid system dismisses this by explaining that “the legislators who enacted the FAA apparently did not foresee the litigation burdens confronting today’s judiciary [or] the complexity with which litigation has developed.”¹⁵¹ The commentator then asserts that Congress’s failure to authorize judicial supervision of arbitration proceedings “may not necessarily indicate an implied prohibition against class-wide arbitration.”¹⁵²

While the commentator’s observation regarding Congress’s lack of foresight is likely true, courts should not interpret congressional inaction at the time of adoption to implicitly *authorize* class-wide arbitration. The Supreme Court has held that courts should not consider Congress’s understanding of its own power at

¹⁴³ Id at R-28 (“The arbitrator may postpone any hearing upon agreement of the parties, upon request of a party for good cause shown, or upon the arbitrator’s own initiative.”).

¹⁴⁴ Id at R-30(a) (“The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.”).

¹⁴⁵ See 9 USC § 10 (allowing an arbitration award to be vacated only for fraud, corruption, or if the arbitrator is guilty of partiality, misconduct, or exceeding his powers).

¹⁴⁶ *Prima Paint Corp v Flood & Conklin Manufacturing Co*, 388 US 395, 404 (1967).

¹⁴⁷ Even Waltcher’s least intrusive option for hybrid proceedings suffers from this flaw. Waltcher, 74 Cornell L Rev at 405 (cited in note 18) (“[A]rbitration without court involvement during the actual proceedings, but with class certification hearings at the filing of the action and a freer appeals process at the close of the arbitration [] presents the most effective means of protecting all interests involved.”).

¹⁴⁸ 9 USC §§ 2-4.

¹⁴⁹ 9 USC § 5.

¹⁵⁰ 9 USC §§ 9-12.

¹⁵¹ Waltcher, 74 Cornell L Rev at 402 (cited in note 18).

¹⁵² Id.

the time of adoption in interpreting the FAA.¹⁵³ Thus, courts interpreting the FAA must rely only on the statutory language and underlying purpose of the legislation in reaching their decisions.

*Circuit City Stores, Inc v Adams*¹⁵⁴ involved a state law employment discrimination claim.¹⁵⁵ Because the plaintiff employee had signed an employment contract requiring all employment disputes to be settled by arbitration, the employer asked the court to compel arbitration pursuant to the FAA.¹⁵⁶ The employee argued that Section 1 of the FAA, which excludes from its coverage “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce”¹⁵⁷ voided the arbitration provision.¹⁵⁸ The Supreme Court disagreed.¹⁵⁹ While the Court acknowledged that Congress might have chosen a different jurisdictional formulation had it known that the Court would later embrace a less restrictive reading of the Commerce Clause,¹⁶⁰ it held that a rule requiring deconstruction of statutory phrases depending on the year of enactment would be unwieldy.¹⁶¹ The Court explained that although “the historical arguments respecting Congress’ understanding of its power in 1925 are not insubstantial, this fact alone does not give us basis to adopt, ‘by judicial decision rather than amendatory legislation,’ an expansive construction of the FAA’s exclusion provision that goes beyond the meaning of the words Congress used.”¹⁶²

Yet even if one acknowledges that the Court may interpret a “controversy”¹⁶³ to include class actions, a solution which views the arbitration clause and class proceeding as equally meritorious—such as class-wide arbitration—does not follow logically. The Supreme Court has long prioritized certain aspects of class action suits over others. In *Eisen v Carlisle & Jacquelin*,¹⁶⁴ the Court held that a plaintiff who was unable to bear the cost of no-

¹⁵³ *Circuit City Stores, Inc v Adams*, 532 US 105, 118 (2001).

¹⁵⁴ 532 US 105 (2001).

¹⁵⁵ *Id.* at 110.

¹⁵⁶ *Id.* at 109–10.

¹⁵⁷ 9 USC § 1.

¹⁵⁸ *Circuit City*, 532 US at 114.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 119.

¹⁶¹ *Id.* at 118.

¹⁶² *Circuit City*, 532 US at 119, quoting *Gulf Oil Corp v Copp Paving Co*, 419 US 186, 202 (1974).

¹⁶³ 9 USC § 2.

¹⁶⁴ 417 US 156 (1974).

tice to potential class members in a Rule 23(b)(3) class action was barred from bringing his claim.¹⁶⁵ By upholding even prohibitively expensive procedural requirements, the Court recognized that a plaintiff does not enjoy an absolute right to bring a class action suit.

When a case is particularly large or complex, the cost of arbitration proceedings often exceeds that of traditional litigation.¹⁶⁶ Because Congress stated that the intent of the FAA was to allow parties to minimize the costs of litigation and expedite dispute resolution,¹⁶⁷ the FAA is most compatible with a model that requires claims to be arbitrated on an individual basis.

B. The Role of Congressional History in Interpreting the FAA

The Supreme Court has held that legislative history should only be consulted when statutory ambiguity exists.¹⁶⁸ An advocate of class-wide arbitration could argue that as a strict textual matter, the phrase “a controversy” in the FAA means *any controversy*. After all, businesses had the option of inserting language to exclude class proceedings from arbitration and did not choose to do so. The language is clear, and a court should honor the parties’ intent by ordering class-wide arbitration; congressional intent in this case is irrelevant. Supreme Court precedent, however, contradicts the argument that the FAA is unambiguous. In *Circuit City*, the Court faced the question of whether the term “any other class of workers engaged in foreign or interstate commerce”¹⁶⁹ referred to workers generally.¹⁷⁰ The Court chose to read the phrase narrowly, determining that it was meant merely to modify “seaman” and “railroad employees,” and limited its application to workers engaged in the transportation industry.¹⁷¹ In interpreting the meaning of this seemingly unambiguous clause, the Court relied upon pre-FAA congressional action regarding disputes between seamen and their employers to determine that Congress had enacted separate legislation specifically to deal with this

¹⁶⁵ Id at 176.

¹⁶⁶ Herbert M. Kritzer and Jill Anderson, *The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, and Cost in the American Arbitration Association and the Courts*, 8 Just Sys J 6, 14–17 (1983).

¹⁶⁷ Hearing on S 4213 and 4214 (cited in note 26).

¹⁶⁸ *Ratzlaf v United States*, 510 US 135, 147–48 (1994) (“[W]e do not resort to legislative history to cloud a statutory text that is clear.”).

¹⁶⁹ 9 USC § 1.

¹⁷⁰ *Circuit City*, 532 US at 114.

¹⁷¹ Id at 119.

class of workers.¹⁷² Similarly, a court determining whether the phrase “a controversy”¹⁷³ includes class actions should consider congressional purpose surrounding adoption of the Act.

A court looking at congressional purpose should focus on the statement that the goal of the FAA was to “settle [] disputes expeditiously and economically” and “reduce the congestion in the Federal and State courts.”¹⁷⁴ At first glance, it would appear that a court could achieve these goals by either ordering individual claims to arbitration or by consolidating arbitration into a class proceeding. Class proceedings, however, are invariably large and complex. As it is often more expensive to arbitrate large and complex cases than it is to litigate them,¹⁷⁵ class arbitration would be anything but expeditious and economical. Thus, courts can achieve the stated congressional goals only by ordering individual arbitration.

C. The Limits of Arbitral Judicial Authority

One commentator has asserted that statutory authority to enforce arbitration implies judicial power to make arbitration effective.¹⁷⁶ Likewise, some plaintiffs have cited the Federal Rules of Civil Procedure as a statutory basis for judicial authority.¹⁷⁷ For example, Rule 81(a)(3) provides that in “proceedings under Title 9, U.S.C., relating to arbitration . . . [the Federal Rules of Civil Procedure] apply only to the extent that matters of procedure are not provided for in those statutes.”¹⁷⁸ Rule 42(a) authorizes consolidation “[w]hen actions involving a common question of law or fact are pending before the court.”¹⁷⁹ Although their language suggests that because the FAA is silent with respect to consolidation of proceedings, Rule 81(a)(3) provides a basis through which

¹⁷² Id at 121, citing Shipping Commissioners Act of 1872, 17 Stat 262, and Transportation Act of 1920, 41 Stat 456.

¹⁷³ 9 USC § 2.

¹⁷⁴ Hearing on S 4213 and 4214 (cited in note 25).

¹⁷⁵ Kritzer and Anderson, 8 Just Sys J at 14–17 (cited in note 166).

¹⁷⁶ See Stipanowich, 72 Iowa L Rev at 526 (cited in note 18) (“In the absence of an express statutory provision, courts should be permitted to order consolidation as a corollary of the power to compel arbitration in accordance with the purposes and policies of modern statutes . . . if this end can be accomplished without undue prejudice to any party.”).

¹⁷⁷ See, for example, *Champ v Siegel Trading Co*, 55 F3d 269 (7th Cir 1995); *Ore & Chemical Corp v Stinnes Interoil, Inc*, 606 F Supp 1510 (S D NY 1985).

¹⁷⁸ FRCP 81(a)(3).

¹⁷⁹ FRCP 42(a). As is plain from the text, the rule does not specifically grant authority to consolidate arbitration claims.

courts may consolidate arbitrations pursuant to Rule 42(a), such an inference cannot be made in the contractual setting. The rules of procedure “do not provide sufficient basis for a court, in effect, to reform the parties’ contracts and force them to arbitrate their disputes in a manner not provided for in the arbitration agreements.”¹⁸⁰ As the Seventh Circuit held in *Champ v Siegel Trading Co.*,¹⁸¹ “absent an express provision in the parties’ arbitration agreement providing for class arbitration, Rule 81(a)(3) does not provide a district court with the authority to reform the parties’ agreement and order the arbitration panel to hear these claims on a class basis pursuant to Rule 23.”¹⁸²

By citing procedural authority to oversee class actions, courts mandating class-wide arbitration overstep the explicit power granted to them under federal law. Federal law permits judicial enforcement of arbitration clauses and, when necessary, appointment of arbitrators.¹⁸³ Section 4 of the FAA grants courts authority to “direct[] the parties to proceed to arbitration in accordance with the terms of the agreement.”¹⁸⁴ Thus, parties can only be forced to consolidate arbitration if they have specifically incorporated such a provision into the contract.¹⁸⁵ The Supreme Court has emphasized that courts must rigorously enforce the parties’ agreement as they wrote it, “even if the result is ‘piecemeal’ litigation.”¹⁸⁶ Courts undertaking a contractual analysis of an arbitration clause have determined that the rules of privity demand that arbitration be limited to disputes between the contract signatories.¹⁸⁷ By ordering class-wide arbitration, a court impermissibly rewrites the parties’ contract, regardless of

¹⁸⁰ *Ore & Chemical Corp.*, 606 F Supp at 1513.

¹⁸¹ 55 F3d 269 (7th Cir 1995).

¹⁸² *Id* at 276–77.

¹⁸³ 9 USC §§ 2–5.

¹⁸⁴ 9 USC § 4 (emphasis added).

¹⁸⁵ See *Weyerhaeuser Co v Western Seas Shipping Co.*, 743 F2d 635, 637 (9th Cir 1984) (declining to order consolidated arbitration because parties contracted for arbitration generally, and not for consolidated arbitration specifically); *WJ Megin, Inc v State*, 434 A2d 306, 308 (Conn 1980) (“[I]n light of our repeated emphasis on the central role played by the terms of a contract in determining the scope of arbitration, . . . there is no judicial authority to [order consolidation].”).

¹⁸⁶ *Dean Witter Reynolds, Inc v Byrd*, 470 US 213, 221 (1985).

¹⁸⁷ See, for example, *Bay County Building Authority v Spence Brothers*, 362 NW2d 739, 741 (Mich App 1984) (declining to order consolidated arbitration because additional plaintiffs lacked privity with the contract between the named plaintiff and defendant); *Pueblo of Laguna v Cillessen & Son, Inc.*, 682 P2d 197, 199 (NM 1984) (“[N]either the provisions quoted, nor any other clauses in either contract provide for the arbitration of disputes other than those arising between the parties to each contract.”).

whether the result is economically or procedurally more efficient.¹⁸⁸

III. PUBLIC POLICY CONCERNS ARE BEST ADDRESSED THROUGH WAIVER OF CLASS ACTIONS

At its root, a mandatory arbitration clause is a contractual matter.¹⁸⁹ Principles of contract law dictate that courts may not void a contract for mere unfairness; a party is free to bargain himself into an unfavorable position.¹⁹⁰ This section argues that current modifications in judicial allocation of arbitration fees provide a better way to simultaneously honor contractual intent and protect a plaintiff's ability to seek remedy than does class-wide arbitration. A judicial solution—despite developing slowly—is the best way to address public policy goals while encouraging judicial efficiency.

A. Freedom of Contract

The Supreme Court has been reluctant to void contractual arbitration agreements, even where one party to a bargain exercises uneven control. In *Gilmer*, the Court expressed this rule quite clearly, stating that “[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable.”¹⁹¹ Even adhesion contracts, through which most mandatory arbitration clauses are adopted, may not be voided easily.¹⁹² May a court review the pricing terms of each contract for sale, either giving its blessing or forcing a discount? The answer, of course, is no, as this would be a drain on judicial resources and an impermissible foray into the parties' freedom of contract. Instead, bargaining permits the parties to negotiate to-

¹⁸⁸ See *Balfour, Guthrie & Co, Ltd v Commercial Metals Co*, 607 P2d 856, 857 (Wash 1980) (“The court should not meddle with [the parties'] contractual provisions even though we might fashion a more expedient, efficient and economical remedy.”).

¹⁸⁹ See 9 USC § 2 (“[An arbitration agreement] shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”).

¹⁹⁰ *Gilmer*, 500 US at 33.

¹⁹¹ *Id.* The Court went on to say that “[r]elationships between securities dealers and investors, for example, may involve unequal bargaining power, but we nevertheless held in *Rodriguez de Quijas* and *McMahon* that agreements to arbitrate in that context are enforceable.” *Id.*

¹⁹² See *Keating v Superior Court*, 645 P2d 1192, 1197 (Cal 1982), quoting *Graham v Scissor-Tail, Inc.*, 623 P2d 165, 172 (Cal 1981) (“To describe a contract as adhesive in character is not to indicate its legal effect. It is, rather, ‘the beginning and not the end of the analysis insofar as enforceability of its terms is concerned.’”).

ward the economically efficient outcome, and permits the party with stronger bargaining power to appropriate more of the resulting surplus.¹⁹³ The rule regarding arbitration of class actions should favor economic efficiency in general, but not waste time ensuring equality in each and every case.¹⁹⁴

Business lawyers point out that when courts interpret mandatory arbitration clauses to waive class action rights, they provide a strategic means for businesses to avoid class action suits entirely.¹⁹⁵ This is a debatable assertion, and Professor Richard Epstein has devoted substantial scholarship to arguing that the principles of freedom of contract limit the ability of a more powerful party to take advantage of a weaker party during contractual negotiations.¹⁹⁶ If a given transaction is not also beneficial to the consumer, he will not engage in the transaction.¹⁹⁷ The fact that the party offering the adhesion contract extracts a larger benefit from the arrangement does not change this. Moreover, the class mechanism cannot be used to regulate a party's use of negotiating power to extract more favorable (or even exploitative) contractual provisions because the class mechanism is solely procedural in nature.¹⁹⁸ The flaw in the consumer advocates' argument lies with the fact that the Supreme Court has ruled that a party may waive a procedural right unless waiver is specifically precluded by statute.¹⁹⁹

The Supreme Court has rejected arguments that arbitration panels are biased and "decline[d] to indulge the presumption that the parties and arbitral body conducting a proceeding will be un-

¹⁹³ See Richard Epstein, *In Defense of the Contract at Will*, 51 U Chi L Rev 947, 974 (1984) (discussing surplus allocation in employment contract negotiations).

¹⁹⁴ See, for example, *Stillwater Leased Housing Associates v Kraus-Anderson Construction Co*, 319 NW2d 424, 426-27 (Minn 1982) (overruling lower court decision to stay arbitration proceedings pending resolution of non-arbitrable indemnification actions because, while favorable in instant case, the stay would provide a party with an avenue through which to avoid mandatory arbitration).

¹⁹⁵ See, for example, Alan S. Kaplinsky and Mark J. Levin, *Excuse Me, But Who's the Predator? Banks Can Use Arbitration Clauses as a Defense*, Bus L Today 24 (May-June 1998) (discussing the use of binding arbitration clauses to defeat class actions); Dunham, 16 Franchise L J at 141-42 (cited in note 17) (arguing that franchisors should adopt arbitration clauses to thwart class actions); Wilburn, Bus L Today at 57-58 (cited in note 16).

¹⁹⁶ See Epstein, 51 U Chi L Rev at 954 (cited in note 193).

¹⁹⁷ Compare *id* at 955 ("It is hardly plausible that contracts at will could be so pervasive in all businesses and at all levels if they did not serve the interests of employees as well as employers.").

¹⁹⁸ See Part II C.

¹⁹⁹ *Mitsubishi*, 473 US at 628 ("[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

able or unwilling to retain competent, conscientious, and impartial arbitrators.”²⁰⁰ Although discovery procedures in an arbitral setting might be less extensive than in the federal courts, a party “trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”²⁰¹ Further, the Court has stated that “even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [substantive law] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.”²⁰² The Court instructed that a claim of unequal bargaining power should be analyzed on a case-by-case basis, and that “mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable.”²⁰³

A proponent of the hybrid system has expressed concern that, if class-wide arbitration is barred, “plaintiffs who might have reaped the benefits of class action litigation will lose that option once arbitration of their claims is compelled.”²⁰⁴ It is true that plaintiffs who would have normally pursued claims as part of a class would be forced to arbitrate claims individually, resulting in an overall increase in the number of arbitration claims. However, the judiciary would enjoy additional efficiency gains through removal of these potential class action suits from the judicial forum. It would be more accurate to focus instead on the present social costs imposed by the explosion of class action litigation—largely attributable to incentives for plaintiffs’ lawyers to litigate and the resultant misallocation of defendant resources through extortion of unwarranted settlements.²⁰⁵ In the private arbitration setting, a large corporate defendant would feel less pressure to settle unnecessarily, as there is no risk of the negative media attention incurred through public access to proceedings and to official court records. Moreover, the substitution of a neutral arbitrator for a potentially hyper-sympathetic jury may reduce the risk of excessive damages awards.

²⁰⁰ Id at 634.

²⁰¹ Id at 628.

²⁰² *Gilmer*, 500 US at 32, quoting *Nicholson v CPC International Inc*, 877 F2d 221, 241 (3d Cir 1989) (Becker dissenting).

²⁰³ Id at 33.

²⁰⁴ Waltcher, 74 Cornell L Rev at 396 (cited in note 18).

²⁰⁵ See John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions*, 86 Colum L Rev 669, 672–73 (1986) (discussing negative economic effects of class litigation).

Setting costs aside, plaintiffs would still have every incentive to pursue claims with true merit. Moreover, an individual plaintiff would enjoy expedited resolution of his claim—one of the greatest benefits of arbitration. When business efforts to eliminate class action suits are viewed from this perspective, it is quite likely that they more accurately serve to restore economic balance, rather than to exploit the already-victimized consumer.

In the wake of *Green Tree*,²⁰⁶ courts have begun to take steps to ensure a plaintiff's access to remedy irrespective of cost. In *Green Tree*, the Supreme Court revisited its earlier holding that a claim may be arbitrated "so long as the prospective litigant effectively may vindicate [her] statutory cause of action in the arbitral forum."²⁰⁷ The Court recognized that arbitration costs "could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum."²⁰⁸ The Court held, however, that the plaintiff has the burden of showing a likelihood of incurring a prohibitively expensive financial burden.²⁰⁹ In the event of a successful showing, the court would invalidate the arbitration clause and permit the plaintiff to pursue her claim in the judicial arena.²¹⁰

Consumer advocates and commentators in favor of class-wide arbitration argue that, for certain claims, the court filing fee itself will exceed the damages sought.²¹¹ Thus, even though judicial relief is available, the impracticality would prevent most plaintiffs from pursuing legitimate claims.²¹² While this is a valid concern, there are less extreme ways to ensure a plaintiff retains the option of pursuing an individual claim. For example, under the

²⁰⁶ 531 US 79 (2000).

²⁰⁷ *Green Tree*, 531 US at 90, quoting *Mitsubishi*, 473 US at 637.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 92. In *Green Tree*, the Court held plaintiff's speculative estimation of costs to be insufficient evidence. See *id.* at 91 & n 6.

²¹⁰ *Green Tree*, 531 US at 92.

²¹¹ See, for example, Melissa Briggs Hutchines, Commentary, *At What Costs? When Consumers Cannot Afford the Price of Arbitration in Alabama*, 53 Ala L Rev 599, 606 (2002). For suggested work-around solutions for lawyers whose class claims are barred by arbitration clauses, see Richard B. Cappalli, *Arbitration of Consumer Claims: The Sad Case of Two-Time Victim Terry Johnson or Where Have You Gone Learned Hand?*, 10 BU Pub Int L J 366, 411–13 (2001).

²¹² See Hutchines, 53 Ala L Rev at 606–07 (cited in note 211) (discussing *Ex Parte Dan Tucker Auto Sales, Inc.*, 718 So2d 33 (Ala 1998)). The *Dan Tucker* court upheld an arbitration agreement that adopted an AAA rule requiring the initiating party to pay fees. *Id.* at 38. The plaintiff, who had a yearly income of \$19,000, could not afford the fees, and was thus unable to seek resolution of his claim. *Id.* at 39.

NYSE rule requiring arbitration of claims,²¹³ it is standard practice for employers to pay all of the arbitrators' fees.²¹⁴ In addition, some arbitrators have begun to waive fees prospectively for plaintiffs with small claims.²¹⁵

Lower courts following *Green Tree* have developed similar case law to preserve a plaintiff's ability to pursue claims. In *Mattox v Decision One Mortgage Co.*,²¹⁶ the District of Massachusetts ordered arbitration in a suit brought by bank borrowers against a mortgage company.²¹⁷ The court ruled that, because the defendant agreed to pay plaintiffs' fees if not waived by the arbitrator, the defendant had eliminated the risk that plaintiffs would not be able to prosecute their claims.²¹⁸ The Fourth Circuit has held that a contractual splitting of arbitration fees does not render an arbitration clause per se unenforceable; instead, the plaintiff must demonstrate that financial hardship "deterred [him] from attempting to vindicate his rights by means of a full and fair arbitration proceeding."²¹⁹ Similarly, the Fifth Circuit found that where a plaintiff had an income "in excess of six figures," a fee-splitting arrangement did not create an obstacle to pursuing his claim.²²⁰ Conversely, when a plaintiff's income is sufficiently small, at least one court has ordered the claim to arbitration but required the defendant to pay the arbitration costs and filing fee.²²¹ While this case law is admittedly in the early stages of development, these types of judicial solutions should satisfy scholars concerned with protecting plaintiffs' ability to pursue their claims. This type of judicial and arbitral protection is the best way to simultaneously respect the strengths of the arbitration tool and ensure resolution of valid claims.

²¹³ NYSE Rule 600.

²¹⁴ *Cole v Burns International Security Services*, 105 F3d 1465, 1483 (DC Cir 1997). See also *Rosenberg v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F3d 1, 16 (1st Cir 1999) (noting that under NYSE rules, a plaintiff is unlikely to bear forum fees).

²¹⁵ See, for example, *Sleeper Farms v Agway, Inc.*, 211 F Supp 2d 197, 203 (D Me 2002) ("[I]t appears that fees in this case have been waived by the arbitrator."); *Green Tree*, 531 US at 91 n 6 ("[P]etitioners' counsel states that arbitration fees are frequently waived.").

²¹⁶ 2002 US Dist LEXIS 18066 (D Mass).

²¹⁷ *Id.* at *1-2.

²¹⁸ *Id.* at *10.

²¹⁹ *Bradford v Rockwell Semiconductor Systems, Inc.*, 238 F3d 549, 558 (4th Cir 2001).

²²⁰ *Williams v Cigna Financial Advisors, Inc.*, 197 F3d 752, 765 (5th Cir 2000).

²²¹ *Giordano v Pep Boys-Manny, Moe & Jack, Inc.*, 2001 US Dist LEXIS 5433, *24-25 (E D Pa). The court assigned costs to the defendant despite a contractual arbitration clause providing for fee splitting. *Id.* at *5-6.

In *Lewis v Prudential Bache Securities, Inc.*,²²² a California Court of Appeals concluded that class-wide arbitration was proper because the arbitration of individual claims “probably [could not] justify the time and money required to prove [them].”²²³ Likewise, a Pennsylvania Superior Court cursorily accepted the Dickler Group’s assertion that “if each Shearson customer was relegated only to individually proceeding in arbitration, the costs involved would effectively bar most, if not all, from obtaining the relief to which they are entitled and which this class action seeks to achieve.”²²⁴ In light of *Green Tree* and the recent trends toward fee shifting or waiver, California and Pennsylvania should reverse their stances on class-wide arbitration and instead order plaintiffs to individually arbitrate their claims.

A consumer advocate might suggest that a waiver of class actions creates grotesque incentives for defendants to cause inefficient harm to consumers, especially when the harm is spread out so thinly that an individual plaintiff would not have much of an incentive to bring suit. Such plaintiffs essentially would then be left without an avenue of recourse. There are several potential solutions to this problem. First, a putative class could call a defendant’s bluff by initiating a multitude of arbitration claims. While each plaintiff would bear only the costs of a single arbitration, the business would be forced to pay separate fees for each arbitrated claim (and may actually pay double for each claim, if in a jurisdiction or under rules that shift arbitration costs). Lawyers will have incentives to pursue arbitration of claims that permit the awarding of attorneys’ fees. Likewise, a consumer advocacy group might volunteer to pay plaintiffs’ arbitration fees in an effort to effect systemic change. If defendants incur significantly onerous arbitration costs, they may begin to specifically exclude class actions from arbitration clauses—thus reinstating a plaintiff’s procedural right to seek a class remedy.

Alternatively, if the instances of low-value harm to consumers significantly increase as a result of the preclusion of class proceedings, Congress could amend the FAA. An explicit congressional mandate would be a true panacea to consumer ills, and, unlike class-wide arbitration, would neither compromise nor diminish the important benefits gained through arbitration. This approach is consistent with the Supreme Court’s expressed reluc-

²²² 225 Cal Rptr 69 (Cal App 1986).

²²³ *Id.* at 75.

²²⁴ *Dickler*, 596 A2d at 864 (quoting plaintiffs’ original brief).

tance to adopt solutions “by judicial decision rather than amendatory legislation.”²²⁵ While consumer losses would likely have to reach a significant magnitude to spur congressional action, consumer advocates should find solace in the fact that individual consumer losses would be small. A few dollars of harm per capita is a small price to pay for a complete, workable solution that maintains the integrity of the arbitration system.

CONCLUSION

At the heart of the incompatibility between class actions and arbitration provisions lies a struggle for freedom of contract. The Supreme Court has laid out very clear rules with respect to interpreting arbitration provisions: the federal policy favoring arbitration may not supersede a party’s freedom of contract, and courts may not read a contractual provision (including an arbitration provision) beyond the intention of the parties. Strictly speaking, an arbitration provision submitting “a controversy” to arbitration could be construed to include class action suits. Supreme Court precedent, however, clearly states that a court may not read into a contract any additional meaning, but must enforce the contract as written. Accordingly, most courts have declined to order class-wide arbitration. Arbitration provisions reflect a contractual agreement between the two signatories, and privity does not extend to third parties, even if those parties are similarly situated. The Federal Rules of Civil Procedure, which confer procedural authority over class actions and are meant to fill the gaps of the FAA, do not confer substantive judicial authority in excess of what the parties contracted for. In addition, the purpose of the FAA—to promote efficient and cost-effective dispute resolution—is not furthered by class-wide arbitration.

With evolving arbitral rules and judicial holdings in the wake of *Green Tree*, consumer advocates may rest assured that putative class plaintiffs will not be left without a remedy. As such, it is time for California and Pennsylvania to reject the hybrid solution. Statutes providing for lawyers’ fees and arbitral/judicial or contractual fee-shifting provisions will ensure that even plaintiffs with small claims are able to secure representation and pursue claims in the arbitral setting. In the meantime, consumers and plaintiffs’ lawyers should engage in creative tactics in an attempt to alter defendants’ business behavior.

²²⁵ *Gulf Oil Corp v Copp Paving Co*, 419 US 186, 202 (US 1974).